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**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

HECTOR LOYA-LOYA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney  
General,

Respondent.

No. 03-74607

Agency No. A77-382-113

MEMORANDUM<sup>\*</sup>

FRANCISCO CHAVEZ-ARGUELLES,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney  
General,

Respondent.

No. 03-74608

Agency No. A77-382-112

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

FRANCISCO CHAVEZ-ARGUELLES;  
HECTOR LOYA-LOYA,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney  
General,

Respondent.

No. 04-74012

Agency Nos. A77-382-112  
A77-382-113

On Petition for Review of an Order of the  
Board of Immigration Appeals

Argued and Submitted October 19, 2005  
Seattle, Washington

Before: BRUNETTI and McKEOWN, Circuit Judges, and KING \*\*, Senior District  
Judge.

In three consolidated petitions, Hector Loya-Loya and Francisco Chavez-Arguelles petition for review of the Board of Immigration Appeals' (BIA's) affirmance of the Immigration Judge's (IJ's) denial of petitioners' applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT) (Petition Nos. 03-74607 and 03-74608), and the BIA's denial of petitioners'

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\*\* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

joint motion to reopen (Petition No. 04-74012). We address the petitions in reverse order.

## **I. Motion to Reopen Petition (No. 04-74012)**

In denying petitioners' motion to reopen, the BIA found that "nothing in the respondent's [sic] submission addresses the findings of the Immigration Judge that the respondents had not met the burden of proof for asylum." The record contradicts the BIA's finding.

Petitioners submitted as Attachment K to their motion to reopen a 1999 report prepared for the Immigration and Naturalization Service entitled "Mexico: Update on treatment of homosexuals," a more recent and detailed report on the treatment of homosexuals in Mexico than the 1997 country report considered by the IJ. In the motion to reopen itself, petitioners discussed the merits of their persecution claims, including both the evidence considered by the IJ and the newly submitted evidence. Petitioners further argued that the IJ's consideration of the merits of their applications was adversely affected by its "primary" decision that petitioners' applications are statutorily barred as untimely, and that the BIA's affirmance was limited to the IJ's decision on untimeliness.

The BIA abused its discretion by failing to address petitioners' evidence and arguments. *Ordonez v. INS*, 345 F.3d 777, 785-86 (9th Cir. 2003). Accordingly,

we grant the petition for review, vacate the decision of the BIA denying the motion, and remand for reconsideration of the motion to reopen.

## **II. Direct Appeal Petitions (Nos. 03-74607, 03-74608)**

### **A. Asylum**

Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the agency's determination that petitioners' asylum applications were untimely and statutorily barred under 8 U.S.C. § 1158(a)(2). *Ramadan v. Gonzales*, No. 03-74351, slip op. at 15038 (9th Cir. Nov. 2, 2005). Petitioners' alternative jurisdictional argument under *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005), is unavailing because petitioners failed to raise their allegation of misleading advice by the IJ in their underlying direct appeal to the BIA. 8 U.S.C. § 1252(d)(1); *Zara v. Ashcroft*, 383 F.3d 927, 930-31 (9th Cir. 2004). Accordingly, the petitions on asylum are dismissed.

### **B. Withholding of Removal**

In light of our decision on the motion to reopen petition, and the potential mootness if the BIA grants reopening, we hold in abeyance the petitions on withholding of removal. The parties are hereby instructed to file a status report with this court within 60 days of the issuance of this disposition, and file notice of the BIA's decision on the motion to reopen within 30 days thereof.

### **C. Convention Against Torture**

Petitioners “ha[ve] not presented evidence that compels any reasonable factfinder to determine that the IJ erred in denying [them] relief under the CAT.” *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1092 (9th Cir. 2005). Accordingly, we deny the petitions on CAT relief.

### **CONCLUSION**

The Motion to Reopen Petition (No. 04-74012) is GRANTED, and the BIA’s decision is VACATED and REMANDED for reconsideration.

The Direct Appeal Petitions (Nos. 03-74607 and 03-74608) are both DISMISSED in part (asylum), HELD IN ABEYANCE in part (withholding of removal), and DENIED in part (CAT).